SUPREME COURT, U. S.

APR 20 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS

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Appellee has moved to dismiss or affirm on the ground that the question in respect to the constitutionality of Penal Law Section 484-i is unsubstantial. This argument does not in any way deal with the merits of appellant's claim, but rests solely on the circumstance that after September 1, 1967 this section will have expired by reason of the enactment of a new Penal Law by the New York legislature.

It is, of course, a matter of pure speculation as to whether or not there will be further prosecutions under § 484-i between now and September 1st. On the other hand, to present counsel's personal knowledge, there has been one prosecution resulting in a judgment of conviction under this section which is now on appeal in the courts of the State of New York. That is the case of *People of the State of New York* v. *David Rabeck,* instituted in the Criminal Court of the City of New York, for the County of the Bronx, under Docket No. B 10352. This resulted in a conviction and a sentence of six months imprisonment, which sentence was, however, suspended. An appeal was taken on February 7, 1967 to the Appellate Term of the Supreme Court of the

State of New York, for the First Judicial Department, and has been noticed for the May session of that Court.

There are thus two convictions under this statute which hang over the heads of the two individuals, and although the convictions are for misdemeanors the fact of such convictions will remain on record and can result in hardship to the individuals in connection with attempts to seek employment and other matters.

There is also here the question of a $100 fine which, if our view of the matter is correct, should be refunded. This Court has held that cases are not moot if costs are involved and surely a fine is at least of the same character: see *Wetzel* v. *Ohio*, 371 U.S. 62.

In addition, there is in this case the question of scienter which is discussed on pages 11 and 12 of the Jurisdictional Statement. The issue in this respect is similar to that in *Redrup* v. *New York*, No. 3 on this Court's docket, which was argued on October 10, 1966 and has not yet been decided.

For all these reasons, I respectfully submit that the motion to dismiss or affirm should be denied and probable jurisdiction noted so that the case can be argued on its merits.

Respectfully submitted,

Osmond K. Fraenkel,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

TANNENBAUM *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 993. Decided June 12, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

MR. JUSTICE BRENNAN would reverse the judgment of the lower court.

MR. CHIEF JUSTICE WARREN, dissenting.

I dissent from the dismissal of this appeal as moot for the reasons stated in my dissent in No. 660, 1966 Term. In my view, the question presented by this case is extremely important and requires a decision on the merits by this Court. I would note probable jurisdiction and set the case for argument.

MR. JUSTICE DOUGLAS dissents. (See dissent set forth in No. 660.)